COUNTY COURT, BOULDER COUNTY (20TH JUDICIAL DISTRICT) **PERMALINK:**	Zhang Jinping Clerk of the Court Filed on November 1, 2023 **^^^ COURT USE ONLY ^^^**
PLAINTIFF(S): Austin B. BOSTON-STORY **DEFENDANT(S):** MAXONYMOUS	**CASE NUMBER:** CO-23-CV-0009A **JUDGE:** NewPlayerqwerty, Chief U.S.D.J.

ORDER ON RULE 360 MOTION AND CONTEMPT OF COURT

I. BACKGROUND

1. "An apology, apparently, is an obsolete gesture in our contemporary American culture" *Greene v. U.S. Postal Service*, 462 F. Supp. 2d 578, 581 n.3 (D. Del. 2006). Sometimes, judges do more than merely sit in judgment of cases or controversies. At times, our guidance, let alone our decisions, can be transformative for better or for worse, for an individual citizen or for many millions. At other times, however, like in the case at bar, sitting on the bench is a lesson in life for us as judges.

2. The case which occupies this Court's bar today is an action for tort brought by Mr Boston-Story, who appears represented by Knick Caldwell and Siad Minaj[1], Esqs., against Mr Maxonymous, the defendant. The events occurred within Boulder County, CO, whilst Mr Boston-Story, a Justice of the United States Supreme Court, was visiting the County. The civil complaint, nominally asserting Federal Question jurisdiction before the United States District Court (see *infra*), alleges that the defendant

[1] Mr Minaj initially filed the action but came to be suspended by the Federal Bar Association whilst the action was pending before this Court, prompting the plaintiff's change of counsel.

"brutally shot at" the plaintiff, causing his death. The record appears to reflect that through no fault of the parties, this action has something of a convoluted history with judges, having been before, before arriving into our court, what appears to be the near entirety of the court. The action was first assigned to JUDGE ARTIST, who, on the eve of trial (30th of September at 22:20 UTC), recused. The Clerk next assigned this case to JUDGE SEB, who promptly thereafter recused, before lastly reassigning to JUDGE MARBOT on the 3rd of October 2023 at 01:21 UTC. MARBOT, J., took the matter to trial, albeit after several delays due to complications related to the *pro se* defendant's private life and arrangements, as well as an assertion of want of personal jurisdiction (see *infra*) a part of the proceedings which, thankfully for him, we did not preside over[2], and which, more than anything else, we think, attests to our brother judge's stoical patience, trial finally being held in the early morning of the 13th October UTC.

3. We thank the plaintiff for his long and comprehensive recording of the trial, which appears to have been marred by several incidents of tumult, the defendant and his counsel appearing before the court in handcuffs. We are nevertheless dubious of the productive effect of such measures and its accompanying swarm of police officers beyond the diminution of the court's sympathy with the defendant, having continued to make vivacious

[2] For the comic relief of our (admittedly restrained) readership we observe that these explanations include being grounded and deprived of access to his computer after another person "spammed" a vulgar slur in the defendant's messaging inbox, only being able to access the digital platform on which trial would be conducted on a Thursday night by reason of his ability to utilise a school computer in order to do so, and the unsuitability of certain courthouses due to technical constraints or fears of "police brutality" (with respect to a courtroom adjoining a police station). Later on the record shows that the defendant changed his mind about police brutality and the courtroom adjoining the police station and specifically wanted to be protected by the local police force, at first seemingly against the (likely misunderstood) advice of the court clerk's office which expressed doubts about potential intruders and disruptors. Last minute witness lists (although we have made no attempt to wade through the court record to determine if this was reciprocal as the defendant alleges, although we find the allegation plausible) and a claimed ban from the digital platform on which trial was conducted also made cameo appearances.

protestations to the court thereafter. Why both the defendant and plaintiff's counsel appeared before the court in military fatigues, supplemented by a tin hat (defendant) and an assault rifle (plaintiff's counsel) is a similar source of perplexion[3]. Counsel for the plaintiff proceeded to explain that his case allowed the court to be satisfied "beyond reasonable doubt". In his opening statement, the defendant (casting aside counsel herefor) appeared to have made it little further than relating his evening meal before a disagreement with an incendiary explosive projectile. Upon his return, he told the court that we were faced with a question going to the core of the "fundamental pillars of civil liberty", commencing with the preamble to the Articles of Confederation, explaining that since Colorado was not one of the thirteen states listed therein, "Colorado is not a state[4]" and that American law does not apply to it, before citing the Federalist Papers[5] and explaining that apparently the "Framers' intent" is incompatible with *something* – the thing with which it is apparently incompatible having remained elusive during the entirety of the defendant's curtailed opening statement[6]. The court then heard, in an ambience of general confusion caused by the discharge of ammunitions, grenades and other projectiles[7], the testimony of two witnesses, Messrs.

[3] Unless, of course, our Clerk has taken the initiative of registering the court and its officers (see *Georgia v. McCollum*, 505 U.S. 42, 64 (1992) ("It is often said that lawyers are officers of the court.") (internal quotation marks omitted)) as supernumeraries for the Colorado Flying Circus.

[4] Incidentally, being an officer of the said State, and being in the process of litigating at our very bar an action revolving upon the rights under the 10th Amendment of the State of Colorado, we have reason to think that the defendant knows better than to raise a similarly frivolous mumbling.

[5] Whilst people, including this court, may appreciate greatly similar performances, courts often do not take to "morass[es] of pseudolegal nonsense" *Owens v. Walker*, Civil Action 21-3761, at *4 (E.D. Pa. Mar. 24, 2023) with excessive charity of spirit.

[6] At a general level, this being the most advanced analysis we have been able to make of it, the defendant's arguments appear generally to assert "that the . . . governmen[t] lack[s] constitutional legitimacy and therefore have no authority to regulate their behavior." *People v. Anderson*, 465 P.3d 98, 101 n.4 (Colo. App. 2020) (quoting *Kilgore-Bey v. Fed. Bureau of Prisons*, Civ. A. No. RDB-17-1751, 2017 WL 3500398, at *2 (D. Md. Aug 14, 2017)). It would be a gross overstatement to say that they are popular with courts. *People v. Lavadie*, 489 P.3d 1208 (Colo. 2021)

[7] For the benefit of the readership, this Court sits in Boulder County, Colorado, and is neither Ashkelon Magistrates' Court nor Dnipro District Court.

Rockefeller (Mason and Colton), confirming largely the contents of the video. In cross-examining the first witness we note that in addition to questions from counsel for the defendant, the defendant in person asked questions to the witness, seeking clarification about the type of firearm he allegedly saw the defendant employing. In consistency with the underlying theme of the trial as will have been apparent by now, during the plaintiff's examination-in-chief of the second witness, one Attorney Yada introduced himself into the courtroom with the slogan "Free [the Defendant]", and during cross-examination of the same witness counsel for the plaintiff sought – successfully – to object to defendant's "leading question". In closing arguments, the defendant's counsel asserted that the plaintiff sought 3000 $ for "emotional damage" and "hospital bills[8]", pointing out that no bills for medical services were provided to the Court. Casting aside and leaving the rational mind at pier, the defendant's counsel went on to suggest that the "blurry" video was not capable of showing that the defendant was actually the individual opening fire, before addressing the fact that the defendant cannot be liable to the plaintiff as he is dead. The defendant's counsel got no further than that before Mr Yada reintroduced himself into the courtroom and opened fire on the judge and various persons present. The defendant's counsel then explained that "murder is not a tort". At the end of closing arguments, MARBOT, J., orally indicated a finding of "liable" and indicated – in no small part due to his having become the target anew of gunshots – that "the formalities" would be conducted at a later time in writing.

4. Following trial, at 03:12 UTC on the morning of the 13th, MARBOT, J. entered a minute order (MO1)[9] holding the defendant liable for "both

[8] The plaintiff contradicted this claim in open court.

[9] https://ptb.discord.com/channels/979205293261078598/1153092374218686514/1162226426192343130

assault and battery". Shortly after 1900 UTC on the same day, JUDGE MARBOT entered a second MO, MO2, on relief, namely $3000 in damages, to be paid in a week, and a letter of apology. A few days thereafter, around 19:00 UTC on the 17th of October, the case was reassigned to us following JUDGE MARBOT's leave of absence. Shortly thereafter we entered a show-cause order (OSC) by MO (MO3), ordering the defendant to make payment before Sunday, October 22nd, 2023 at 00:00 UTC, or to show cause as to why the defendant ought not to be held in contempt of court until such a time as he shall have made such payment. Notice of the order was served upon the defendant by the Clerk of Court. The defendant then expressed his desire to appeal against judgment, before presenting a Rule (3)60 motion under Fed. R. Civ. P. 60, Colo. R. Civ. P. 60 or Colo. R. Civ. P. 360 instead – as these motions serve extremely proximate if not identical purposes we reserve discussion of their distinction for later.

5. In the defendant's rule (3)60 motion, he submits that the damages awarded (3000 Dollars) "represents the maximum relief allowable", referring to the statutory limit on damages awards in a number of cases, and suggesting that the order of an apology "exceeds" that limit – as far as we understand it, the defendant suggests that an apology should be assigned some pecuniary-equivalent value, and once that value is taken into account the relief awarded should be seen as exceeding the statutory limit. Secondly, the defendant claims that the order to issue a written apology violates his 1st Amendment rights as compelled speech, making him serve as a "mobile billboard for the State's ideological message". In response the defendant seeks to refute these arguments – he denounced the suggestion that value be assigned to an apology as "silly". Regarding the 1st Amendment claim, the defendant argues that the apology is not constitutive of "government-mandated speech" (i.e. compelled speech) as

the court only required that *an* apology be issued, and not the words to be used to achieve that objective.

6. Lastly, because we do not award any greater damages than our brother judge, nor have we altered the fundamental aspects of the remedy, we issue also in this order a final warning to the defendant, failing which he will be held in contempt of court by the operation of this order alone.

II. JURISDICTION AND LEGAL STANDARDS

7. Before we proceed any further, we recall that this court and its judges have a trilogy of hats (or perhaps, more fittingly, robes, gavels and wigs) in each judge's chambers. See G.M.D. § 1-08. Not only are we United States Judges, but we also exercise state jurisdiction both as judges of the State's court of general jurisdiction (the District Court) and the County Court. We discussed the upshot of this concurrence of jurisdiction, substantive, and procedural law at some length in a recent case. See *In re Gaviria* 2 A.A. Dig. _____, CO:23-EX-0001/QWT (Colo. Cty. Ct. 2023).

8. Under the *Gaviria* doctrine, we first must begin with the facial statement of jurisdiction – the United States District Court for the District of Colorado. We easily overcome this presumption in the case at bar by excluding federal jurisdiction, however — even though the civil complaint alleges, in boilerplate form, Federal Question jurisdiction under 28 U.S.C. § 1331, we find no actual federal question whether plausibly or actually raised, and recall our obligation to construe pleadings liberally in order to do justice, namely to "to secure the just, speedy and inexpensive determination of every action" Colo. R. Civ. P. 301. See also Fed. R. Civ. P. 1 (Construction and application of Rules "to secure the just, speedy, and inexpensive determination of every action and proceeding"), Colo. R. Civ. P. 1. We note lastly, that whilst the plaintiff could perhaps (subject to the question of the sum in controversy, which we can reserve for another day)

allege diversity of citizenship, he does not seek to do so, and in the absence of a clear and valid assertion to that effect, the principles of comity and more generally common sense which are among those which underlie the *Gaviria* doctrine suggest otherwise.

9. We next are faced with the question of what court the action is to be assumed as being brought in. We favour in the case of concurrent jurisdiction like here the County Courts over District Courts, since the former are specialist courts conceived for specific kinds of actions like these, but not, in cases like this, the small-claims procedure (Colo. R. Sm. Clm. Ct. P. 501 et seq.), whose application would both be prejudicial to the parties and we think, more importantly, contrary to the underlying intent of the plaintiff – proceedings before the Small Claims Division are heard normally without counsel and before a magistrate judge, for instance, with only limited provision for discovery and constrained powers to award relief.

III. MERITS OF THE RULE 360 MOTION

A. LEGAL STANDARD; GENERALLY

10. The defendant-movant brings his Rule (3)60 motion – as the text of the two rules are identical in operative part we refer to them interchangeably. A motion may be brought under subdivision (a) in order to repair errors of the court, or subdivision (b) on other grounds. The movant does not seek to explain which of the 5 grounds under which a Rule 360(b) order may be sought he intends to relies on. Colo. R. Civ. P. 360 ("(1) Mistake, inadvertence, surprise or excusable neglect; (2) fraud . . . , misrepresentation, or other misconduct of an adverse party; (3) [void judgment]; (4) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have

prospective application; or (5) any other reason justifying relief from the operation of the judgment"). We must therefore categorise his claims, and deny those which do not fall under any category.

11. We begin with his excess of relief claims. A certain number of torts are, within Colorado, codified by the Code of Torts, concerning, in relevant part Colo. C. Torts §§ 1.02 and 1.03, namely the torts of assault and battery. As stated *supra*, the defendant alleges that the court ordered relief in excess thereof – we think this to be fundamentally a simple allegation of error on the part of the court. Federal practice under Rule 60 has long admitted that cases which "confus[e] special and general damages", Wright, Miller and Kane, 11 Fed. Prac. & Proc. Civ. § 2854 (3d ed.), for instance, may, for instance, be eligible for Rule 60(a) or (b)(1) correction – we think this to be a relevant principle of sagacity.

12. In any event, whilst courts in this State have explained before that a Rule 60(b)(5) or 360(b)(5) motion "is not a substitute for appeal, but rather is meant to provide relief in the interest of justice where extraordinary circumstances exist." *In re People ex rel. A.P.*, 526 P.3d 177, 183 (Colo. 2022), we are nevertheless somewhat convinced that the highly laconic statement of the court precisely renders impossible meaningful appellate testing of the order – it would in fact be a rather delicate affair we think for an appellate court to, other than functionally retry the whole case on the record, address specific questions of law, or even fact, which qualify for appellate review – after all, in this State it is well settled that "a trial court's order must contain findings of fact and conclusions of law sufficient to give an appellate court a clear understanding of the basis of its decision" *Siding v. Gravina*, 516 P.3d 37, 51 (Colo. App. 2022). See also *Weld County v. Slovek*, 723 P.2d 1309, 1316 (Colo. 1986) ("[T]he trial court must articulate the reasons for its decision so as to facilitate effective

appellate review"). In a wider context, we have found that "[i]t is an elementary axiom of procedural due process that where significant rights are at issue, the decision-maker must state the reasons for his determination." *Saxe v. Board of Trustees*, 179 P.3d 67, 79 (Colo. App. 2007) (quoting *Mau v. E.P.H. Corp.*, 638 P.2d 777, 780 (Colo. 1981)).

13. Were the motion a mere challenge against a well-reasoned decision – even if unsound – we would not have been minded to grant the motion, but we do not find it conducive to the interests of justice for appeal to be had against a judgment with no reasons attached to it whatsoever, for it is not the role of our brother judge who may sit as a judge of appeals to retry the whole cause on papers and transcripts. As a brief aside we note that whilst commonly discussed within the notice and service context, courts in this state have previously held that violation of due process may in fact cause for a judgment to be void, although admittedly we may doubt as to whether or not the particular circumstances of failure to notify had their hand therein. See *Best Trust v. Ch. Creek Bank*, 792 P.2d 302, 304 (Colo. App. 1990) ("A judgment may be void, and not merely erroneous . . . because the procedure used to enter the judgment violated due process rights."). We observe also that whilst "a district court's power to award particular relief is not jurisdictional" *Williams v. Dep't of Pub. Safety*, 369 P.3d 760, 775 n.4 (Colo. App. 2015) because they are courts of general jurisdiction, the same statement does not hold true for county courts and so as a jurisdictional question, we are entitled to raise it at any time. For a discussion of the county courts' limited power to fashion injunctive relief, see *Snyder v. Sullivan*, 705 P.2d 510 (Colo. 1985). In the interests of the economy of our litigants' time we discuss this question no further.

B. ARGUMENTS AT TRIAL

14. In the interest of the preservation of a hypothetical appellate brother judge's sanity, we propose first to summarise the factual claims before us. The facts we are minded to believe, even were they being challenged (they are not, but we nevertheless consider ourselves obligated to restate them under Rule 360(a)) are unambiguous. For the same reasons, we address each distinctive legal argument made by the defendant, even if we need not consider every single "bald factual or legal assertions presented without argument or development" *Ute Water Conservancy Dist. v. Fontanari*, 524 P.3d 308, 323 (Colo. App. 2022) (quoting *Cikraji v. Snowberger*, 2015 COA 66, ¶ 21 n.3, 410 P.3d 573, 578 n.3)

15. A 29-second video produced in evidence appears to show that at 0:21 of the video, the defendant aimed a rifle in the general direction of the plaintiff and opened fire, and that the defendant collapsed to the ground almost immediately thereafter. Having heard the evidence by recording, it is hard for us to see how, on a preponderance of the evidence, it can reasonably be claimed that the defendant is not the author of the gunshots. We think it plain that a reasonable factfinder like our brother judge would have held that he did indeed discharge those shots. We address next – and very briefly – the defendant's arguments of law. As preposterous as they may seem at first, we do not think that they ought to be completely cast aside, but considered carefully before being rejected. Since the damages arguments form the crux of the Rule 360 motion we reserve them, see *infra*. We address thus at this stage only whether or not an action may be had for homicides[10].

16. The question of death is one of particular peculiarity in view of the technical circumstances thereof. To begin with the basics, "[a]t common

[10] We are unsurprisingly satisfied, to the civil standard at the very least, that this is a homicide.

law, there was no cause of action for wrongful death." *Ablin v. R. O'Brien Plastering*, 885 P.2d 289, 290 (Colo. App. 1994), however, "although "tort law largely finds its origin in the common law, ... legislatures increasingly participate in determining what conduct constitutes a tort." *Bermel v. BlueRadios, Inc.*, 440 P.3d 1150, 1157 (Colo. 2019). In furtherance to that active legislative role in the law of tort, the bulk of State private-law tort statutes, as distinct from other provisions of a procedural nature inherent to this court's ability to exercise jurisdiction, however, have been impliedly repealed and replaced by a new code of torts making no provision for wrongful death and the extinguishment of claims therewith. Authorities, as far as we can tell, appear to be mixed and nuanced on the question, relying largely on wrongful death statutes from whose wise counsels we benefit not. See for instance *Oliveros v. Mitchell*, 449 F.3d 1091, 1093-95 (10th Cir. 2006) *accord Fish v. Liley*, 120 Colo. 156 (Colo. 1949). To continue along that avenue of reflection however, would be, we fear, to dig ourselves alongside the defendant into a hole – we perhaps ought more rationally to recognise that the plaintiff was in fact not killed, but "merely" gravely injured such that he lost consciousness. Death, after all, is best defined as "[t]he ending of life; the cessation of all vital functions and signs." *Death*, Black's Law Dictionary (11th ed. 2019), or "a *permanent*[11] cessation of all vital . . . functions : the end of life . . . the state of being no longer alive : the state of being dead" *Death*, Merriam-Webster Dictionary[12] (emphasis added). Since this clearly was not the effect of the plaintiff's alleged "death", in such an instance we have no difficulties countenancing the action at our bar. The broader legal effects of his injury appear to us to be consistent with this reading – the

[11] We need not attempt to address the complex questions and nuances relating to an irreversible vegetative state or any similarly delicate question in the case at bar.

[12] https://www.merriam-webster.com/dictionary/death [https://web.archive.org/web/20230323195657/https://www.merriam-webster.com/dictionary/death]

plaintiff brought the action in his own name[13], appearing alongside his counsel in court, and he did not vacate any offices he held upon that death, nor did he suffer any of the other legal effects of "death". Similarly, upon the "death" of JUDGE MARBOT, he involuntarily absented himself from the court, being for a time incapacitated, before returning to the court a short time thereafter. Perhaps the only slight difficulty with this logic arises with respect to criminal offences relating to "homicide", yet even so the legislature appears to our mind to have provided for sentences not commensurate with that of the ordinary offence of murder, namely "[t]he killing of a human being with malice aforethought" *Murder*, Black's Law Dictionary (11th ed. 2019) but that of a felony assault of a grave nature. Happily, since we sit only in judgment of a tort action and nothing else, we may pass on that question for a later time.

C. DAMAGES

17. We look first to the (simpler) question of damages. The defendant claims, quite simply, that the $3000 dollars in damages exceeds the statutory limit, and in support of this claim exhorts us to assign a monetary value to the apology he has been ordered to issue to the defendant.

18. As surprising as this may be for such an apparently novel argument, courts have previously addressed whether an apology is a form of "money damages". See *Birnbaum v. United States*, 588 F.2d 319, 335 (2d Cir. 1978) (Holding that apology letters are not monetary damages). Whilst there may be room to make a cogent case for some monetary equivalent value to be attached to an apology where the conditions of its making will be especially costly and onerous on the defendant, this is not one of them. We note furthermore, that even supposing that an apology is indeed a form

[13] Leaving the complex question of law aside, a plain common-sense-led logical exercise precludes a dead person from doing so, since an inanimate corpse cannot walk to the Clerk's office to file a complaint.

of monetary relief – as a matter of law, we disagree and hold that is equitable relief, see for instance *Desjardins v. Van Buren Community Hosp*, 969 F.2d 1280, 1282 (1st Cir. 1992) – that the assertion according to which the Colorado Code of Torts limits award of damages to $3000 appears to our mind to be erroneous – adding the sums for punitive and compensatory damages on each of the two torts alleged together, we reach a total of $3500.

19. The defendant is not, however, completely wrong in alleging that the judgment merits clarification and correction on this point. The order distinguishes not between any of the forms of damages which may be awarded, nor does it operate any such distinction between each count. Whilst the sum total of the damages award undoubtedly does not exceed the statutory limit, the same, by reason of the laconic formulation of our brother judge, may, admittedly exceed the maximum quantum of damages awardable either as punitive or compensatory damages. Since the quantum of damages is nothing if not a game of characterisation, it is thus imperative for the court to proceed by their careful composition.

20. "There are three kinds of damages which can be considered in a civil case. These are special compensatory damages, general compensatory damages, and punitive damages." *Big O Tire Dealers, Inc. v. Goodyear Tire Rubber*, 408 F. Supp. 1219, 1248 (D. Colo. 1976) or so the ordinary first-year introduction to the subject matter goes. We begin with the distinction made between compensatory and punitive damages (nominal damages, by their vary nature, are irrelevant to the question of statutory limits on quantum). "Compensatory damages are the damages awarded to a person as compensation, indemnity or restitution for harm sustained by him." Restatement (Second) of Torts § 903 (internal quotation marks omitted). Meanwhile, punitive (or exemplary) damages are "awarded against a

person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future [and] may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." Restatement (Second) of Torts § 908. Generally speaking, "[t]he common law definition of "punitive damages" focuses on the nature of the defendant's conduct. As a general rule, the common law recognizes that damages intended to compensate the plaintiff are different in kind from "punitive damages."" *Molzof v. United States*, 502 U.S. 301, 307 (1992).

21. Moving onto compensatory damages in particular, these once again come in two common forms – special and general damages. *Sas Inst., Inc. v. World Programming Ltd.*, 874 F.3d 370, 384 n.3 (4th Cir. 2017) ("Direct damages, also known as general damages, are such as might accrue to any person similarly injured, while consequential (or special) damages are such as did in fact accrue to the particular individual by reason of the particular circumstances of the case.") (quotation omitted). Accordingly, "if a claim is made for great bodily harm, the plaintiff can recover damages for physical suffering and for a broken leg without proof as to the first, but only after proof of the second". Restatement (Second) of Torts § 904 (internal quotation marks omitted).

22. It is a settled Colorado rule that "special damages, which are not the usual and natural consequence of the wrongful act complained of, must be specifically pled and proved." *DerKevorkian v. Lionbridge Technologies*, Inc., Civil No. 04-cv-01160-LTB-CBS, at *7 (D. Colo. Jan. 26, 2006) accord *First Citizens Bank & Trust Co. v. Stewart Title Guar. Co.*, 320 P.3d 406, 414 (Colo. App. 2014) ("Consequential or special damages must be specifically pleaded in the complaint"). Since the plaintiff pleaded only

"compensatory and punitive damages", making no specific allegation of special damages, we decline to grant any.

23. Moving onto general compensatory damages, it is well understood that "in a tort action, pain and suffering are normally compensable parts of general tort damages" *Bushnell v. Sapp*, 194 Colo. 273, 281 (Colo. 1977). Whilst it is clear to our mind did indeed suffer bodily injury, and suffering and inconvenience resulting therefrom, to our mind, it may have been particularly opportune were greater facts on the aftermath of the gunshots pleaded before us – in assessing general damages we ought to take into account not only the (proven) existence of fear or anxiety, suffering, injury &c. but also, and crucially, their degree and extent. No such evidence is before the court. In its absence, we may only take general guidance, and in any event quantum of damages is not exactly of the same minutiae as quantum physics. We commence by taking the sum awardable on each count and combining them (2000$), and, almost like a criminal sentencing exercise[14] look to the kinds of tortious act the statutory tort is intended to respond to, pinning the gravity of the tortfeasor's misdeeds on a scale thereof and looking to the gravity of the effect of the tortfeasor's misdeeds on the plaintiff. We do not at this stage consider the punitive prong of damages. We accept that a firearms incident involving loss of consciousness must surely fall within the higher reaches of bodily harm – we are not faced with the question of a mere punch in the face. We recognise it also plausible that the incident led to the loss of or damage to some items of property, although as the plaintiff pleads neither special damages nor destruction of property as a cause of action we do not believe ourselves to be in much of a position to fashion out of pure equitable spirit a monetary remedy for him. We cannot, however, on the sole pleadings

[14] This is not in fact all that surprising, see for instance *American Tele. Comm. v. Manning*, 651 P.2d 440, 447 (Colo. App. 1982) ("[C]riminal statutes are often relied upon by the courts in fashioning common law tort principles")

quite fathom to what extent the tortfeasor's actions may have caused inconvenience, distress, pain or suffering – certainly, regaining consciousness in a faraway place is inherently the generator of *some* inconvenience, but other than that certainty we are without detailed factual information. Lastly, it must be observed that since, "[i]n the absence of contrary indication, we assume that when a statute uses [a term of art], [the legislature] intended it to have its established meaning." *United States v. Thomas*, 939 F.3d 1121, 1137 n.6 (10th Cir. 2019) (MATHESON, J., dissenting) (quoting *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991)), within the statutory maximum, it will have been contemplated by the legislature that both special and general damages ought normally to be comprised therein, although we think this to be of only incidental effect in "ordinary" actions for assault or battery – in general, although by no means categorically, we see no reason to expect elevated medical fees, loss of earnings in significant amounts or any particularly significant quality-of-life losses as being anticipated by the legislature, nor, contrariwise, do we think that the legislature intended for a single, flat damages measure equal to the statutory maximum to be awarded in every instance – had it wished to do so it could have so provided by enactment.

24. Having taken into account the relative gravity of the tort – we do not examine for this part the mindset – we must first operate a "deduction" from the statutory limit to account for special damages, unawarded in their entirety, before accounting for the fact that no particular information has been placed before the court as to the inconvenience or suffering engendered by the tortfeasor's acts. In doing so, we find it difficult to award an amount greater than $1250 in compensatory damages. Perhaps

we may have been well placed to award otherwise had the action been better pleaded before us.

25. We proceed now to punitive damages. "[O]ften . . . eligibility for punitive awards is characterized in terms of a defendant's motive or intent" *Kolstad v. Am. Dental Assn*, 527 U.S. 526, 538 (1999). On once sentence, "[a]n award is authorized for willful and wanton conduct" *Razi v. Schmitt*, 36 P.3d 102, 105 (Colo. App. 2001) or malice. *Ajay Sports, Inc. v. Casazza*, 1 P.3d 267, 278 (Colo. App. 2000) (A court "may… award exemplary damages if the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct"). At common law, "the main factors in setting the amount of an award of punitive damages have included (1) the reprehensibility of the defendant's misconduct, (2) the defendant's wealth, (3) the profitability of the misconduct, (4) litigation costs, (5) the aggregate of all civil and criminal sanctions against the defendant and (6) the ratio between the harm caused or potentially caused by the defendant's misconduct and the losses suffered by the plaintiff" Dan B. Dobbs, The Law of Torts § 484 (2d ed.). Similarly, we are also guided by the overriding principles of the measure of damages, namely in order to (a) to give compensation, indemnity or restitution for harms; (b) to determine rights; (c) to punish wrongdoers and deter wrongful conduct; and (d) to vindicate parties and deter retaliation or violent and unlawful self-help." Restatement (Second) of Torts § 901. In this State, statute gives us affirmative instructions. Colo. Rev. Stat. § 13-21-102.

26. Once again, we are governed less by our idealistic pursuit of justice but by the reality of the pleadings at bar. Because of the punitive, quasi-penal character of punitive damages, governing statute in this state requires that "exemplary damages must be established by proof beyond a reasonable doubt" *Bonidy v. Vail Valley Ctr.*, 232 P.3d 277, 285 (Colo. App. 2010). We

pause briefly to clarify why we hold the punitive damages statute but not the Wrongful Death Act as governing – the first and foremost is "legal stability", that concept "upon which the rule of law depends" *Cbocs West, Inc. v. Humphries*, 553 U.S. 442, 457 (2008). The second, simply put, is our duty "to give effect to the intent of the legislature" *Department of Hwys. v. Mountain States*, 869 P.2d 1289, 1290 (Colo. 1994). As a general rule, we will hold that a statute is intended to have effect where firstly we create no prejudicial new rule of substantive law, secondly, when it is plainly compatible with expressly enacted law and, thirdly, justifiable as inherent to ordinary and proper proceedings before the court of a regular and ordinary character. We are well satisfied that the reasonable-doubt standard ticks all three of these boxes. Unsurprisingly, "[t]he reasonable doubt burden is by definition a heavy one," *Alhilo v. Kliem*, 412 P.3d 902, 912 (Colo. App. 2016) (quoting in part *Tri–Aspen Constr. Co. v. Johnson*, 714 P.2d 484, 486 (Colo. 1986)) (internal quotation marks omitted), and the obvious analogy can be made with the criminal evidence standard.

27. Even so, we are satisfied beyond reasonable doubt on the account of the tortfeasor's intent that the act was malicious, or, at the very least, willful and wanton. It was not, however, we think a carefully planned or premeditated act. Borrowing from our doctrine of criminal sentencing practice, we take into account

28. Since punitive damages are, tautologically, punitive in nature, is to our mind proper for the court to have regard to the fact that before it, the defendant's conduct has been largely reprehensible – whilst we accept that he is more than entitled to challenge the plaintiff's version of the facts, and refute his own liability, and that doing so neither *ispo facto* increases nor reduces the measure of punitive damages. We are aware that the defendant alleges that he is meagre means, but as we have no evidence or clear

indication before the court on the question of the defendant's means we refuse to take the matter into account. Lastly, taking another leaf out of the criminal procedure playbook, we consider the defendant's prior conduct. *Vensor v. People*, 151 P.3d 1274, 1280 (Colo. 2007) ("In imposing a sentence within [the legally permissible] range[15], a court may consider not only the conduct with which the offender was expressly charged, but also unrelated criminal conduct and even aspects of his life that go beyond antisocial conduct."). He has been arrested numerous times for violent offences. Indeed we heard evidence under oath to the effect that the defendant is negatively known to the law enforcement community generally for his antecedents. Even taking the point at the lowest, and giving the defendant a comfortable benefit to account for the potential phenomenon of ""round[ing] up the usual suspects" who have a history of prior bad acts" *U.S. v. Queen*, 132 F.3d 991, 996 (4th Cir. 1997), there must be at least *some* truth to his twenty-three arrests (of which fourteen are for violent offences) in his own name and 20 (of which 14 are violent) in his *alter ego* as one Attorney Yada[16]. Doing so, however, must not lead us to automatically imposing the most severe quantum permissible. As the Supreme Court has "previously observed [in the criminal context], "A sentence that is too long, or improperly conceived, tends to reinforce the criminal tendencies of a convicted defendant."" *People v. Edwards*, 198 Colo. 52, 58 (Colo. 1979) (quoting in part *People v. Duran*, 188 Colo. at 213, 533 P.2d at 1119).

29. Our paramount lodestar must however be the gravity of the acts and the culpable mind of the tortfeasor, not his history of violent and reprehensible conduct. "Punitive damages serve to punish the defendant and to deter others from similar conduct in the future, but their purpose is not to

[15] In this case, "up to $1500".

[16] The defendant admits this on the record of the court, so we take judicial notice thereof. We thank JUDGE POWELL for consulting the records for us during a temporary indisposition.

compensate an injured plaintiff." *Carey v. After the Gold Rush*, 715 P.2d 803, 804 (Colo. App. 1986). Accordingly, "[s]ince the purpose of punitive damages is to punish the wrongdoer as an example to others, and not to compensate the plaintiff, an award of punitive damages is unrelated to the plaintiff's conduct." *Bodah v. Montgomery Ward*, 724 P.2d 102, 104 (Colo. App. 1986). The obverse of this coin, therefore, is the fact that the plaintiff's quite natural and understandable desire to obtain the maximum measure possible does not automatically justify it. The context of an unpremeditated attack does not qualify to our mind for the very highest punitive damages, although we are confident that they do indeed fall into an upper tier thereof. The factors giving rise to punitive damages must, of course, exceed the bare minimum elements of the torts alleged – in the case at our bar we note that there appears to be no justification whatsoever for the tortfeasor's attack, conducted with a firearm and causing loss of consciousness. Contrariwise, we are not convinced that the attack was premeditated – rather, it was in our view a rather crude attempt on video and in front of numerous witnesses, with no particular personal gain perceivable or pleaded before the court. In order for an award of the very highest measure of punitive damages, we think it necessary for at least some of those elements of sophistication or particular gravity to have been demonstrated. In the circumstances it is hard – once again perhaps our judgment may have differed had the action been more comprehensively pleaded – to our mind to award any greater than two-thirds to three-quarters of the statutory limit.

D. THE APOLOGY

30. We proceed next to the question of the apology. The defendant's arguments here appear potentially to be less incoherent. It was, of course, addressed in a well legacy Supreme Court opinion. *Caldwell v. Dream* 9

U.S. 73 (nUSA 2020). This doctrine does not control anymore, see *Artist v. Rubio* 1 AA.Dig. ____ (nD.Colo. 2023), and so we are free to being only partially persuaded by it – had it controlled we would invariably have distinguished it, for it provides no guidance as to the compelled-speech argument before the court today, fixating instead, rather bizarrely we think, on the Thirteenth Amendment and shunning the more obvious compelled-speech and self-incrimination arguments. Since no general discussion of the governing principles has been expressed since then, we think it expedient to discuss it briefly first.

31. Before we do, we recall that "under the doctrine of constitutional avoidance, we address constitutional issues only if necessary." *People v. Hernandez*, 487 P.3d 1095, 1104 (Colo. App. 2019). We first must understand that, assuming that the court does have the power to award an apology, it is in any event a form of equitable remedy, like an injunction, and the court "possesses broad discretion in fashioning an equitable remedy" *Bd. of Cnty. Comm'ns of the Cnty. of Park v. Park Cnty. Sportsmen's Ranch*, LLP, 271 P.3d 562, 574 (Colo. App. 2012). That said, "[e]quitable relief is available only when the law affords none." *In re Marriage of Hall*, 971 P.2d 677, 679 (Colo. App. 1998).

32. Regarding the more common context of an injunction, "a successful application for permanent injunction must demonstrate (1) that a danger of real, immediate, and irreparable injury exists, (2) that a plain, speedy, and adequate remedy at law is lacking, (3) that the injunction would not disserve the public interest, and (4) that the public interest favors the injunction." *Joseph v. Equity Edge*, 192 P.3d 573, 576-77 (Colo. App. 2008). An apology cannot, to be sure, be equated systematically to an injunction – they are very different forms of relief indeed. We look next to the realm of declaratory judgment, which also is not to our mind without

resemblance to an apology in some contexts. First of all, "[t]o the extent a declaratory judgment is a sufficient remedy, an injunction is unnecessary and unwarranted." *Aurora Urban Renewal Auth. v. Kaiser*, 507 P.3d 1033, 1049 (Colo. App. 2022). Because, contrary to an injunction, "action for declaratory judgment is a statutory [*viz*. Colo. R. Civ. P. 57] rather than an equitable action" *Rhodes, M.D. v. Copic Insurance Co.*, 819 P.2d 1060, 1062 (Colo. App. 1991), "[t]he granting of declaratory relief is a matter resting in the sound discretion of the trial court and is not precluded even when there is another adequate remedy." *Air Sols. v. Spivey*, 529 P.3d 644, 664 (Colo. App. 2023) (quoting *Troelstrup v. Dist. Ct.*, 712 P.2d 1010, 1012 (Colo. 1986). Although attempts to seek apologies are often cast as actions for injunctive relief, see inter alia *Gobel v. Maricopa County*, 867 F.2d 1201, 1204 n.6 (9th Cir. 1989), *Dahn v. Adoption Alliance*, 164 F. Supp. 3d 1294 (D. Colo. 2016), *Pascoe v. Cabressa*, Civil Action 3:23-cv-007-RGJ (W.D. Ky. June 20, 2023), we are not entirely satisfied that the public interest or prongs are particularly sympathetic to the nature of an apology in the case at our bar, although without a doubt certain refinements may be appropriate in other contexts. See for instance *Dahn* 164 F. Supp.3d, *supra* at 1318 (D. Colo. 2016) ("The [United States District] Court finds more persuasive those cases finding that a court ordered apology is generally an inappropriate remedy" in civil rights context.), Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 Cornell L. Rev. 1261 (2006).

33. We nevertheless give the plaintiff the benefit of the doubt at this juncture and begin to consider the question of apologies themselves. The meaning of the word "apology" was discussed at some length in *Stewart v. Vivian*, 151 Ohio St. 3d 574 (Ohio 2017).

34. Much academic ink has been spilt over the value, or to the contrary, perversity, of apologies in a judicial context. See Michael Hristakopoulos, *On the Moral and Constitutional Perversity of Court-Ordered Apologies*, 45 Vt. L. Rev. 365 (2021), Peter H. Rehm and Denise R. Beatty, *Legal Consequences of Apologizing*, 1996 J. Disp. Resol. (1996), Alfred Allan and Robyn Caroll, *Apologies in a Legal Setting: Insights from Research into Injured Parties' Experiences of Apologies after an Adverse Event*, 24 Psychiatr Psychol Law 10 (2017), Andrea Zwart-Hink et al., *Compelled Apologies as a Legal Remedy: Some Thoughts from a Civil Law Jurisdiction*, 38 University of Western Australia Law Review 100 (2014), *Mineworkers Investment Co (Pty) Ltd v Modibane* 2002 (6) SA 512 (W), Susan Alter, *Apologising for Serious Wrongdoing: Social, Psychological and Legal Considerations*, Final Report for the Law Comm'n of Can. (1999), Prue E. Vines, *Apologies As Corrective Justice in Tort Law: Reparation and Compensation as (Partial) Redemption in a Torts System*, UNSW Law Research Paper No. 18-79 (2017). The need to replenish court printer cartridges and toner, however, cannot be said to have much to do with the question. That said, the question has occasionally come before the judiciary, even if, like in Ohio, "the constitutionality of an apology letter [as a judicially ordered measure] would be a matter of first impression" *State v. George*, 2021 Ohio 476, 5 (Ohio Ct. App. 2021).

35. "Because [an apology] strike[s] at the heart of an individual's conscience, ordering an individual to apologize raises core First Amendment concerns." White, 91 Cornell L. Rev., *supra* at 1299. Even if infrequent, courts have previously addressed the question of whether or not letters of apology are impermissible compelled speech. We address a few cases in turn. Before doing, so however, we must observe that the First Amendment does not apply to governmental speech, as White observes. See for instance *Shurtleff v. City of Boston, Mass.*, 142 S. Ct. 1583, 1589

(2022) ("The First Amendment's Free Speech Clause does not prevent the government from declining to express a view… When the government wishes to state an opinion, to speak for the community, to formulate policies, or to implement programs, it naturally chooses what to say and what not to say.") (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–469, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009)). While this does not of course mean that the court definitely is empowered to order apologies from public bodies, it does mean that analysis in those cases may well be different, and that we only consider in the case at bar cases where an apology is expected of a private citizen and not the government.

36. "[A] letter of apology demonstrates a recognition and acceptance of responsibility for harmful actions … Additionally, an apology letter recognizes the victim's interest in receiving an apology from the perpetrator. An apology allows the victim to hear an acceptance of responsibility from the very person who inflicted the harm." *State v. K.H.-H.*, 185 Wash. 2d 745, 756 (Wash. 2016) (finding an apology letter appropriate for a juvenile as serving a rehabilitative goal), *accord U.S. v. Clark*, 918 F.2d 843 (9th Cir. 1990). See, more generally *U.S. v. Gementera*, 379 F.3d 596 (9th Cir. 2004) (affirming requirement to wear write letters of apology and carry a sign stating "I stole mail"), but see *HTH Corp. v. Nat'l Labor Relations Bd.*, 823 F.3d 668, 677-78 (D.C. Cir. 2016) (sanction by Federal administrative agency). See also *In re Weddigen*, 42 N.E.3d 488, 500-04 (Ill. App. Ct. 2015) (STEIGMAN, J., specially concurring) (Compelled apology to purge contempt of court proceedings should be subjected to strict scrutiny). Sometimes, especially outside of the penal context, courts take an intermediate, approach. *Kelly Sutherlin Mcleod Architecture, Inc. v. Schneickert*, 194 Cal.App.4th 519, 531-32 (Cal. Ct. App. 2011) (Allowing arbitrator to compel a correction of false statement but not to compel an apology as "as it goes beyond simple

communication of facts and improperly compels the expression of opinion".), *HTH Corp.*, 823 F.3d, *supra* (approving NLRB requirement to either confess to the violations or cause for a notice of the NLRB decision to be read out). *Sysco Grand Rapids, LLC v. Nat'l Labor Relations Bd.*, No. 19-2371, at *18 (6th Cir. Sep. 4, 2020) (Denying compelled reading of a statement as an "extraordinary remedy").

37. We look next at the specific character of the educational context. In this peculiar context, the government (i.e. the school) is empowered to require speech that is "reasonably related to legitimate pedagogical concerns" *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1231 (10th Cir. 2009) (quoting *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290 (10th Cir. 2004)), but see *Oliver v. Arnold*, 19 F.4th 843, 858 n.7 (5th Cir. 2021) (EN BANC) (HO, J., concurring in denial of rehearing en banc) (Calling *Corder* court's application of *Axscon-Flynn* a "bizarre result"). Part of the education context's particularity is no doubt related to the fact that schools have an interest "in educating students as to civility and cultural values and promoting respect for authority and social, moral, and political values" *Riggan v. Midland Independent School Dist*, 86 F. Supp. 2d 647, 660 (W.D. Tex. 2000) and, perhaps more importantly, "in regulating speech that materially disrupts classwork or involves substantial disorder or invasion of the rights of others" *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038, 2045 (2021) (quoting in part *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 513, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969)) (internal quotation marks omitted).

38. Many courts do not subscribe to the belief that they hold the power to order an apology, however. See *Dahn*, 164 F. Supp. 3d, *supra*, *Harris v. Marsh*, 2:21-cv-12107, at *8 (E.D. Mich. Feb. 9, 2022) ("federal courts lack the authority to order a defendant to speak in a manner that may well

contravene the beliefs the defendant holds.") (quoting *Woodruff v. Ohman*, 29 F.App'x. 337, 346 (6th Cir. 2002)). This, however, must be contextualised – most of the authorities which stand for this proposition come from Federal courts which are of "limited jurisdiction" *Estate of Harshman v. Jackson Hole Mountain Resort Corp.*, 379 F.3d 1161, 1164 (10th Cir. 2004), a principle which, is guided in large part by "important values of federalism", *Id.*, and, moreover in civil rights claims, which are governed by strong doctrines of sovereign immunity, see, for instance, *Tarrant Regional v. Sevenoaks*, 545 F.3d 906, 911 (10th Cir. 2008) ("The Eleventh Amendment has been interpreted to bar suits against states and state agencies for money damages in federal court."), *Affiliated Prof. Home Health Care v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999) ("This Court has long recognized that suits against the United States brought under the civil rights statutes are barred by sovereign immunity."), and qualified immunity, see *Torres v. Madrid*, 60 F.4th 596, 602 (10th Cir. 2023) ("The doctrine of qualified immunity in civil-rights suits under § 1983 protects all but the plainly incompetent or those who knowingly violate the law.") (quoting in part *Mullenix v. Luna*, 577 U.S. 7, 12, 136 S.Ct. 305, 193 L.Ed.2d 255 (2015) (per curiam)) (internal quotation marks omitted). See also *Carter v. Transp. Workers Union of Am.*, Civil Action 3:17-CV-2278-X, at *18 (N.D. Tex. Aug. 7, 2023) ("[Apologetic] statements would not be narrowly tailored to vindicate Title VII's policies, so the Court will not compel those statements."). Even so, some courts have held that it is indeed permissible remedy. See *Villescas v. Abraham*, 285 F. Supp. 2d 1248, 1256 (D. Colo. 2003). On the other hand, some state courts have held that apologies are nevertheless impermissible, see *Essex County Correction Officers v. Shoreman*, 2005 Mass. App. Div. 30, 32 (Mass. Dist. Ct. App. 2005) ("An apology is an expression of a feeling of regret and, as such, may not be compelled by state action."). This view

is nonetheless not more or less persuasive than any of the others – progeny of this interpretation of the First Amendment appears often (although importantly not in *Shoreman*) to relate to administrative decisions (functionally sanctions) made summarily, imposing an apology as a condition. See *Wilkinson v. Bensalem Tp.*, 822 F. Supp. 1154 (E.D. Pa. 1993) (conditioning plaintiff's right to speak at a public meeting on his apology for previous speech). We note lastly that we are unpersuaded by those authorities which rely upon *McKee v. Turner*, 491 F.2d 1106, 1107 (9th Cir. 1974), which stands, unlike its purported progeny, for the much less lavish proposition that a defamation action over a letter alleging merely that plaintiff "had malice in his heart when he suggested to the . . . police that they could perform their legal duty [at a time]" *McKee v. Turner*, 491 F.2d 1106, 1107 (9th Cir. 1974) "is de minimis, and does not present a justifiable controversy" *Id*. Whilst the 9th Circuit itself appears to have understood its own statement, see *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984) (summarising *McKee* as holding that "request for an apology *de minimis*"), other courts have turned it into sweeping authority in support of refusal to grant apologies. See for instance *Cisco v. Myers*, CIVIL ACTION No. 4:19-CV-P118-JHM, at *4 (W.D. Ky. Mar. 2, 2020).

39. None of these authorities, however complete, dispositively address the First-Amendment issue that the defendant raises, however. Before pursuing, we briefly note that we have a small doubt about whether we, as a county court of limited jurisdiction, have the power – unlike the District Court of general jurisdiction – to issue equitable relief in the form of an apology, but "[o]nly an inefficient and unreasonable jurisdictional scheme would permit the county courts to entertain [specific] disputes but prevent the courts from granting full relief" *Snyder v. Sullivan*, 705 P.2d 510, 514 (Colo. 1985). While usually rolled up into a request for injunctive relief,

"[a]n injunction is generally a preventive and protective remedy, aimed at future acts; it is not intended to redress past wrongs." *Id*., whereas an apology, like a decree of specific performance, is aimed by its very nature at the latter – an apology for a future act quite simply appears nonsensical.

40. We proceed next onto our own independent inquiry as to whether an apology should issue. We note first of all, that courts have made extremely unfavourable comparisons between compelled admissions of guilt and dictatorial practices (Stalin and Mao appear to be particular favourites for comparison). The general rule on compelled speech is that "[t]o establish a claim … a defendant must show that the subject conduct constitutes (1) speech, (2) to which the defendant objects, that is (3) compelled by governmental action." *Scardina v. Masterpiece Cakeshop, Inc.*, 528 P.3d 926, 939 (Colo. App. 2023) (quoting *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015)).

41. All three prongs are easily and obviously met in this case – a written message consisting of words is clearly speech for the First Amendment, the defendant himself does not agree with it, and this court is clearly part of a "branch of government" *People v. ex rel. N.R.*, 139 P.3d 671, 680 (Colo. 2006).

42. We now move onto scrutiny of the compelled apology. We do so whilst being mindful that "[t]here is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees `freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say." *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1231 (10th Cir. 2009).

43. "[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances." *People v. Ryan*, 806 P.2d 935, 937

(Colo. 1991) (quoting *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942)), even though it is well understood that "[o]ur state constitution provides more expansive protection of speech rights than provided by the First Amendment of the United States Constitution and Supreme Court precedent." *Colorado Education Ass'n v. Rutt*, 184 P.3d 65, 77 n.11 (Colo. 2008).

44. Standards of scrutiny, and by extension the legal requirements governmental interference in speech must overcome differ based on the kinds of restrictions imposed. "[R]egulations that suppress, disadvantage, or impose differential burdens upon speech because of its content" are subject to strict scrutiny, while "regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny." *Cinamerica Theatres v. City of Boulder*, 50 P.3d 921, 924 (Colo. App. 2002) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642, 114 S.Ct. 2445, 2459, 129 L.Ed.2d 497, 517 (1994)) *accord People v. Moreno*, 506 P.3d 849, 853 n.3 (Colo. 2022) (Observing that courts should apply "strict scrutiny for content-based regulations and intermediate scrutiny for content-neutral regulations"). See also *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1178 (10th Cir. 2021) ("Whether viewed as compelling speech or as a content-based restriction, [governmental interference] must satisfy strict scrutiny—i.e., [the government] must show a compelling interest, and the [interference] must be narrowly tailored to satisfy that interest.") (*rev'd on other grounds 303 Creative LLC v. Elenis*, 143 S.Ct. 2298, 2313 (2023)).

45. A court ordered apology is clearly a content-based restriction – by "apology", we mean the term broadly as described in *Stewart*, 151 Ohio St. 3d, *supra*. Some apologies, like the one in *Riggan v. Midland Independent School Dist*, 86 F. Supp. 2d 647 (W.D. Tex. 2000), for instance ("I'm sorry you're offended. I didn't intend to offend you. I didn't

do anything to offend you. P.S. Lee sucks.", *Riggan,* 86 F. Supp. 2d at 659 [17]) might not, and even so we are not entirely sure, even if the concept of the apology is taken to its drastic minimum of the word "sorry", largely devoid of any context, if it is a content-neutral requirement. A mere requirement to pay lip service, allowing an apologiser significant latitude to choose words importing minimal commitment or admission is more likely to be constitutional, but will quickly run afoul of the very purpose of an apology. Invariably, an ordinary apology like the one contemplated, however, will be a content-based restriction.

46. We like to think that there are three parts to strict scrutiny analysis – N for "necessary", A for "appropriate" and P for "proportionate" – that is to say that the restriction must be "supported by a compelling governmental interest" *Sanger v. Dennis*, 148 P.3d 404, 415 (Colo. App. 2006) – i.e. it must be "necessary to promote a compelling state interest" *Rocky Mountain Gun Owners, Nonprofit Corp. v. Hickenlooper*, 371 P.3d 768, 772 (Colo. App. 2016), next it must be "narrowly drawn to achieve that interest" *Sanger*, 148 P.3d at 415 (Colo. App. 2006), and lastly it should "achieve that interest by the least restrictive means possible" *Id*. It is important to note that restrictions like these are not assumed to pass the "NAP test". See for instance *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358 (2009) ("Restrictions on speech based on its content are "presumptively invalid" and subject to strict scrutiny."). We must first identify what are compelling governmental interests – the trouble is that "the Supreme Court[s] ha[ve] not always been crystal clear as to what constitutes a compelling interest in free speech cases" *U.S. v. Stevens*, 533 F.3d 218, 227 (3d Cir. 2008). See for instance *Evans v. Romer*, 882 P.2d 1335, 1347 (Colo. 1994) ("a substantial governmental interest is not

[17] Note however that the *Riggan* court did not address the First Amendment but only the Fifth's right to freedom from self-incrimination.

sufficient to render constitutional a law which infringes on a fundamental right — the interest must be compelling") contra *Marco Lounge v. Federal Heights*, 625 P.2d 982, 987 n.6 (Colo. 1981) ("To characterize the quality of the governmental interest which must appeal, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong.") (quoting *United States v. O'Brien*, 391 U.S. 367, 376-77, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672, 679-80 (1968)). That being said courts "rarely fin[d] such an interest for content-based restrictions" *U.S. v. Stevens*, 533 F.3d at 227. Even so, at least one federal Circuit has held that "effective administration of justice is a compelling interest" *U.S. v. Cary*, 897 F.2d 917, 926 (8th Cir. 1990) (citing *United States v. Spilotro*, 786 F.2d 808 (8th Cir. 1986)). In the same vein, courts have consistently held that preventing, deterring, or punishing various forms of violence (admittedly in the penal context) is also a compelling interest. *Seeboth v. Allenby*, 789 F.3d 1099, 1106 (9th Cir. 2015) ("The state's interest in preventing violent crime is more than legitimate; it is compelling."), *Nat'l Rifle Ass'n, Inc. v. Bureau of Alcohol*, 714 F.3d 334, 346 (5th Cir. 2013) ("There is an important governmental interest in reducing violent crime."), *U.S. v. Weston*, 255 F.3d 873, 880 (D.C. Cir. 2001) ("The Supreme Court has recognized that preventing crime is a compelling governmental interest."). That said, while we think that there is clearly a governmental interest in being able to accord relief against tortfeasors, this does not alone, because "the universe of common-law torts [consists of] all private wrongs, or civil injuries, which may be offered to the rights of either a man's person or his property" *Haddle v. Garrison*, 525 U.S. 121, 127 (1998) (quoting in part 3 W. Blackstone, Commentaries on the Laws of England 118 (1768)) (internal quotation marks omitted), rise we think to a "compelling" interest – not everything which would make society more pleasant or less cruel rises to a

compelling interest. "Only the grav*est* abuses, endangering paramount interests, give occasion for permissible limitation [of fundamental rights]" *In re Marriage of Ciesluk*, 113 P.3d 135, 144 (Colo. 2005) (quoting *Sherbert v. Verner*, 374 U.S. 398, 406, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963)) (emphasis added). We are prepared, however, to believe that in specific circumstances, such as where the tortious misconduct is particularly grave by reason of some characteristic that the governmental interest will indeed become compelling.

47. Assuming that there is a compelling interest, and that we can order an expressive, content-guided apology we hit another obstacle, since these compelled practices also do not fundamentally serve any reparative or rehabilitative aim, even if nominally constitutional, for "a public apology compelled by this Court, even if permissible, would be insincere at best" *In re Inquiry Concerning Judge Norris*, 314 Ga. 10, 15 (Ga. 2022) (see also *Mata v. Avianca, Inc.*, 22-cv-1461 (PKC), at *33 (S.D.N.Y. June 22, 2023) ("a compelled apology is not a sincere apology")). A begrudging apology – this is, putting the First Amendment bar at the *very lowest*, the most we are able to compel, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002) ("The government cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts") (quoting *Stanley v. Georgia*, 394 U.S. 557, 566 (1969)) (internal quotation marks omitted). Accordingly, the court will have reached precisely the same roadblock as with *Riggan* apologies in any event – "[t]he law cannot regulate what people believe, but the law can regulate how people act, even if how they act is based on what they believe" *S.C. Dept. of S.S. v. Father Mother*, 294 S.C. 518, 523 (S.C. Ct. App. 1988)[18]. An apology, on

[18] As an aside, the current state of scientific understanding – most thankfully – makes it hard for us to see how we could give effect to court-mandated thoughts, and for all the difficulties it may generate to us in assessing defendants' and tortfeasors' intents, we most solemnly hope that it never will.

the other hand, is a modern, secular, version of the "amende honorable" *Wiggins v. Tiller*, 230 S.W. 253, 254 (Tex. Civ. App. 1921), *cf*. Jan Hallebeek & Andrea Zwart-Hink, *Claiming apologies: a revival of amende honorable?*, 5 Comparative Legal History 194 (2017). Even assuming that the goals of rehabilitation and restorative justice are cognisable in the civil context as being able to overcome the compelling interests hurdle, these virtues of an apology rely not on the performance, however successful, of a script-reading but upon a sincere recognition as a step toward making amends and improving future conduct. The compelled apology as punishment and deterrence, however, in which a defendant is asked to write or read out an admission of the error of his ways will serve only the Stalinian effect of degradation of the human condition, self-attrition, and humiliation, but will not in any way do justice to the plaintiff, ultimately defeating the governmental interest such a requirement is supposed to serve.

48. That said, we are not dubious of the fact that, even though apologies do "not mend bones, fix homes, or pay for expensive surgeries" *Caldwell*, 9 U.S. at 74, they provide "emotional support unavailable from less-than-human remedies." *Id*. The purpose of an apology is of course germane to the purposes of remedy in tort actions, and no authority we have cited appears to say anything to the contrary. While they were dubious at the idea of administrative agencies being able to require forced apologies alone *Conair Corp. v. NLRB*, 721 F.2d 1355, 1401 (D.C. Cir. 1983) (GINSBURG, J., dissenting) ("A forced, public confession of sins, even by an owner-president who has acted outrageously, is a humiliation this court once termed incompatible with the democratic principles of the dignity of man.") (quoting *International Union of Electrical, Radio Machine Workers v. NLRB*, 383 F.2d 230, 234 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 904, 88 S.Ct. 818, 19 L.Ed.2d 871 (1968). See 640 F.2d

at 402), they appear to have had less issues where the sanctioned individual is not being asked (in the euphimistic sense) to "publicly proclaim the errors of his ways whilst detained in stocks at the town square" *Carter v. Transp. Workers Union of Am.*, Civil Action 3:17-CV-2278-X, *supra*, at *19, but is merely required to make a content neutral statement or has the option of either doing so, or carrying out some other, less expressive action, and the humilitative attrition of the notice reading cannot be the end goal. See for instance *Overstreet v. Absolute Healthcare*, No. CV-22-00361-PHX-GMS, at *17 (D. Ariz. June 23, 2022) (NLRB-mandated "notice reading in particular is designed to 'ensure that the important information set forth in the notice is disseminated to all employees, including those who do not consult the [employer's] bulletin boards") (quoting *UNF W., Inc. v. NLRB*, 844 F.3d 451, 463 (5th Cir. 2016)).

49. We think that in the First Amendment context of compelled speech similar considerations control. A mandatory apology alone can *never* satisfy strict scrutiny as the mandatory nature of the apology by definition defeats the purpose of the apology. The court can, however, encourage a tortfeasor to apologise, and it can give the tortfeasor the choice of either apologising or carrying out some other reasonable action in lieu of apologising. In the case at bar we will give the defendant one of two choices: (i) he can either apologise to the plaintiff and recognise that a clear video and multiple witnesses saw him commit an act of violence against the plaintiff, and that doing so prejudiced the plaintiff, or (ii) he can accept that a public notice bearing his name and explaining succinctly the findings of this court be published by us, at least in part at his expense. This notice will, we think, accord relief to the plaintiff in a manner broadly commensurate to an apology – it serves as a recognition of the plaintiff's vindicated rights – without requiring the defendant to "stoop" to what must be for him an

unprecedented low point of having to recognise that he sometimes makes mistakes and take ownership of them. Constitutional rights do not generally protect a citizen against payment of nonexcessive fines, taxes, damages, and restitution, and there is no expressive message involved in paying a court-ordered fee: it is simply a legal obligation which implies no opinion whatsoever. *May v. McNally*, 203 Ariz. 425, 431 (Ariz. 2002) ("there is no expressive content inherent in paying a traffic fine"), *Markadonatos v. Vill. of Woodridge*, No. 12-2619, at *23 (7th Cir. Jan. 8, 2014) ("When substantive due process is understood properly, it obviously does not prevent the government from imposing a fine or fee as part of the punishment for a crime."), *U.S. v. Wood*, 384 F. App'x 698, 706 (10th Cir. 2010) ("The nonpayment of taxes, however, is not speech or conduct protected by the First Amendment."), *Parker v. Darby*, 599 F. App'x 348, 3 (10th Cir. 2015) ("The payment of restitution or fines, without more, does not qualify as a significant restraint on liberty."). Lastly, whilst we probably would not have liked to do so, given the defendant's penchant for delaying execution of his legal obligations, we will give him a reasonable timeframe to so so as we set out in our order. We recognise that this is a decision that he will not enjoy making very much, and so we also propose to incentivise reducing further delay in justice to the plaintiff by reducing the defendant's cost burden if he decides to allow justice to be done sooner rather than later.

50. We lastly analyse our proposed order through the prism of the Fifth Amendment. We only do so briefly since neither party raises it. Generally speaking, voluntary apologies are not protected by the Fifth Amendment. See for instance *U.S. v. Feldman*, 83 F.3d 9, 14 (1st Cir. 1996). Leaving aside the complex question of whether the civil apology would be privileged, made under duress or otherwise inadmissible we note that there are three possible outcomes – firstly, the criminal court may simply hold

that the apology is inadmissible – to be clear whether it will or not is a question for elsewhere and another day, which unlike an extorted confession, would not in any event defeat the objective of the measure, secondly, he can choose to write a "*Riggan* plus" apology[19], wording his apology in a way, which, whilst sincere, and heartfelt, can be conditioned in such a manner on the findings of this court, such that it does not impute criminal guilt[20] (*E.g*. "I accept that on the balance of probabilities I have been found to have opened fire on you. I realise that opening fire on you has had disruptive consequences on your life.) or thirdly, he can refuse to apologise altogether in which case we will cause for publication of a notice in the court's name.

E. THE PLAINTIFF'S ENTITLEMENT TO RELIEF

51. There can be little doubt to suggest that the defendant is not exactly a gentleman of the most upright character, or well liked by many. His conduct both giving rise to the claim and throughout the proceedings, as well as, and we are well-entitled to take judicial notice of this, elsewhere, is hardly that of a model citizen. For these reasons we suspect that the plaintiff, will quite understandably be dissatisfied by our judgment. None of these, however, allow us to fashion the relief which we think would be *desirable* for the plaintiff in abdication the law. We could perhaps have omitted this final passage, yet what is a judgment of law if it may be understood only by one part yet not the other. We think that as an eminent jurist the plaintiff will understand our conclusions of law. Perhaps he would, perhaps we would, even, would have desired, ruling *ultra petita*, deprive the defendant of his right to bear a firearm, impose upon his mind

[19] The original *Riggan* apology was completely devoid of sincerity, see *supra*.

[20] Finding the equilibrium between an insincere apology and one which admits criminal guilt is of course harder than walking a tightrope, and arguably requires the literary ease of Shakespeare, Dickens, Cardozo and Learned Hand combined, but if the defendant *genuinely* wishes to express civil remorse without risking criminal prosecution – admittedly the motives of doing so may be somewhat dubious in their sincerity and moral character – it is not we think materially impossible.

genuine remorse and a will for future correction and until then hold him within the custody of the People of the State of Colorado. Before we do so, however, we remember the wisdom of our uncles, great-uncles and great-great-uncles having graced our benches, recall the long and arduous history that has been the subjection of that unkempt primate we call *homo sapiens* to the law – first of the law divine and spiritual, next to that of his lieges and lastly to that of his peers. We remember the oath, sworn in some form for several centuries now to "administer justice without respect to persons, and do equal right" to all manner of men. We recall that the unbridled, unguided and unassuaged pursuit of a pretended "equity" is not justice, but mere despotism. Every citizen has "ups and downs" in his life, and nobody may claim to be of such perfect conception and limitless fortune that he shall never find himself before the judiciary as plaintiff, defendant or complainant. He can but hope to receive a fair and just disposition in accordance with those laws and customs that shall have been precedingly expounded.

52. We lastly cast our mind, like the Supreme Court of the United States has at least thrice done, to one Sir Thomas More, Lord Chancellor of England:

> Yes, I'd give the Devil benefit of law, for my own safety's sake.

R. Bolt, *A Man for All Seasons*, Act I, p. 147

IV. CONCLUSION AND ORDER

The Court **ORDERS** as follows;

1. That the motion for under Colo. R. Civ. P. 360 is **GRANTED IN PART**:
    a. That Minute Order MO2 is **set aside**.
    b. That the Court sua sponte **amends** MO1 with the findings of fact in Part III-B.

c. The court **ORDERS** as relief follows:

- **General compensatory damages:** $1250;
- **Punitive damages:** $1100;
- **Equitable remedy:** That either: (i) the defendant issues an apology of not less than 1500 characters, including spaces and standard punctuation, in clear and legible English, and directly addressing his tortious actions ***OR*** (ii) the court shall publish a public notice in a prominent place declaring the defendant liable as a tortfeasor in the form prescribed by paragraph 3(b) of this order.

2. **That** if payment is not made, or a payment plan made between the parties and agreed by the court, on or before 12:00 UTC on the 8th of November 2023, the **defendant shall be held in contempt of court**, and fined 200 USD for every week of delay. *The contemnor may move to set aside this part of the order of the Court in whole or in part, or to have the order varied, upon a showing that he lacks the means to pay.*

3. **That** if (A) the defendant has not, on or before 12:00 UTC on the 8th of November 2023, issued his apology to the defendant, (B) before that time declares clearly and unequivocally to this Court that he does not wish to issue an apology, or (C) the produced apology is not acceptable to the court, **the court shall cause for a notice to be published** in a prominent place as follows:

a. The defendant shall be liable:

- If he, before 00:00 UTC on Sunday the 5th November 2023, declares to the court that he will not issue the apology and wishes for a notice to be in consequence published, to **three quarters** (rounded up to the nearest whole dollar) of any publication costs incurred by the notice (the other quarter of which shall be defrayed at the Court's expense);
- If publication is proceeded with more more than approximately 72 hours after this order (Sunday 5th November at 00:00 UTC), whether by default under paragraph 1(b) or by the defendant's own voluntary refusal

to issue an apology, to the payment of the entirety of those costs;

b. The form of the notice shall be as follows:

- The notice shall bear, insofar as is technologically possible, the seal of this Court, or in the alternative another marking designating it as being an official notice of this Court;

- The notice shall be signed by the Clerk of the Court;

- The notice may bear, if technologically feasible, a photograph of the defendant, in letters less prominent than those

- The notice shall be worded, in clearly legible letters of a suitable size and colour, and in a common serif font, as follows:

> THIS NOTICE HAS BEEN PUBLISHED BY ORDER OF THE COURT
>
> Defendant MAXONYMOUS has been found liable of committing assault and battery against Austin B. BOSTON and causing his death within this County.
>
> This notice forms part of the relief awarded by the court in a civil lawsuit arising out of those tortious actions since the tortfeasor [has chosen not to/has failed to] apologise for this tort.

c. The notice shall be published as follows:

- In one or more prominent places within Boulder County that the Clerk of Court shall identify after conferring with competent planning authorities;

- For a consecutive period of at least one week and not more than two weeks in such places.

4. **That** should the defendant choose to make an apology, but such apology does not meet the requirements of paragraph 1(c), he shall be allowed only to make minor, stylistic or other incidental changes thereto, and that if the apology issued is incapable of being made to meet those requirements by

virtue of permissible alterations, it shall be deemed as if the plaintiff has failed to issue an apology.

5. Should the defendant fail to make payment to the court, or set up a payment plan agreeable to the same, of any potential costs of publication within a timely manner that the court shall by ulterior order determine, he may be held in contempt of court and imprisoned for 10 minutes for every period of 96 hours until he shall make payment for such costs. *The contemnor may move to set aside this part of the order of the Court, or to seek variation thereof, upon a showing that he lacks the means to pay.*

6. The Court **reserves jurisdiction** on all payment plans/instalments, any proceedings to enforce this order and any motion for sanctions.

7. The parties are **notified** that appeal against this order is to be had in the Colorado District Court for the 20th Judicial District, and that such appeal must be timely made. See Colo. R. Civ. P. 411.

8. That if payment of the damages award is not made, or a payment plan not implemented, before the 15th November at 12:00 UTC, interest shall accrue for every week at the rate of 1.5% (compound), rounded up to the nearest whole dollar, for every week of nonpayment.

9. That any prior order of the Court contrary hereto or inconsistent herewith is **set aside**.

It is so ORDERED.

1st November 2023

/s/NewPlayerqwerty

C.U.S.D.J.,

Sitting as a judge of the County Court
Boulder County, CO (20th Judicial District)

We can but hope that the parties will one day reach their destination on their epic odyssey for and against an apology.